

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs January 23, 2001

TIMOTHY V. BOWLING v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Washington County
No. 26168 Lynn W. Brown, Judge

No. E2000-02247-CCA-R3-PC
March 12, 2001

The petitioner, Timothy V. Bowling, appeals the trial court's dismissal of his petition for post-conviction relief. In this appeal of right, the petitioner contends that the trial court erred by ordering a dismissal without an evidentiary hearing. The judgment is reversed and remanded to the trial court for the appointment of counsel and an evidentiary hearing.

Tenn. R. App. P. 3; Judgment of the Trial Court Reversed.

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JAMES CURWOOD WITT, JR., JJ., joined.

Timothy V. Bowling, Pro Se.

Paul G. Summers, Attorney General & Reporter; Glen C. Watson, Assistant Attorney General; and Victor Vaughn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

A first trial on the arson indictment for a fire at the residence of Sonya Price ended in a mistrial. At the conclusion of a second trial on June 2, 1995, the petitioner was convicted of arson, a Class C felony. The petitioner and Price, who were never married and who were separated at the time of the fire, had two children as a result of a sporadic 12-year relationship. On direct appeal, this court affirmed. State v. Timothy v. Bowling, No. 03C01-9805-CR-00167 (Tenn. Crim. App., at Knoxville, Sept. 28, 1999). This court ruled that the petitioner did not file a timely motion for a new trial, thereby precluding an appellate challenge to the admission of certain evidence. Tenn. R. App. P. 3(e). This court also determined that the petitioner failed to file a timely notice of appeal, but waived the deficiency in the interests of justice in order to address the challenge to the sufficiency of the evidence, as authorized by rule. Id.

On June 19, 2000, the petitioner filed this petition for post-conviction relief, alleging as grounds therefor the following:

- (1) The trial court lacked jurisdiction because the elements of the crime had not been proved;
- (2) the trial court improperly instructed the jury on circumstantial evidence, resulting in a denial of due process of law under the state and federal constitutions;
- (3) the trial court failed to clarify jury instructions as to the elements of the offense, thereby denying due process guarantees under the state and federal constitutions;
- (4) the trial court erred by allowing tainted testimony which was not properly objected to by defense counsel;
- (5) the trial court erred during the sentencing hearing by admitting prior offenses which were not objected to by defense counsel;
- (6) the trial court failed to follow sentencing guidelines;
- (7) the state was guilty of prosecutorial misconduct, thereby depriving the petitioner of due process of law under the state and federal constitutions;
- (8) the petitioner was denied the effective assistance of counsel in violation of the state and federal constitutions;
- (9) that a retrial of the petitioner after the grant of a mistrial violated principles of double jeopardy under the state and federal constitutions.

(Emphasis added).

The trial court entered an order of summary dismissal based upon its determination that the petitioner had failed to state a colorable claim under Tenn. Code Ann. § 40-30-206(d) which provides in pertinent part as follows:

The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings. Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition. . . .

The dismissal was based upon the petitioner's failure to allege anything more than "bare allegations" unsupported by factual explanations. See Pewitt v. State, 1 S.W.3d 674, 676 (Tenn. Crim. App. 1999). In this appeal, the state submits that each of the nine claims were either waived, previously determined, or properly dismissed for failure to state a factual basis.

A colorable claim is one "that, if taken as true, in the light most favorable to the petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." Tenn. Sup. Ct. R. 28, § 2(H). Tenn. Code Ann. § 40-30-206 governs concepts of waiver and previous determination:

(g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

(1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or

(2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

(h) A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

Tenn. Code Ann. § 40-30-206(g)–(h).

Subdivisions (d) and (e) of Tenn. Code Ann. § 40-30-206 also include the following additional language:

If, however, the petition was filed pro se, the judge may enter an order stating that the petitioner must file an amended petition that complies with this section within fifteen (15) days or the petition will be dismissed.

(e) If a petition amended in accordance with subsection (d) is incomplete, the court shall determine whether the petitioner is indigent and in need of counsel. The court may appoint counsel and enter a preliminary order if necessary to secure the filing of a complete petition. Counsel may file an amended petition within thirty (30) days of appointment.

Among his various grounds for relief, the petitioner alleged that his trial counsel was ineffective. While that allegation, as the trial court observed, was general and not supported by

specific facts, there were two other allegations that encompassed claims of ineffective counsel and that were, in our view, marginally supported by facts:

D. The Court erred in allowing "tainted" testimony in the second trial that was contrary to the First trial; and which was not properly objected to by defense counsel.

E. The court erred in allowing alleged "prior convictions" to enhance the sentence imposed when no Notice of Enhancement was filed with the Court; and Defense counsel failed to object to said ruling.

Trial courts are required to accept allegations in a petition for post-conviction relief as true. It may not consider other matters contained in the record in determining whether a petitioner is entitled to an evidentiary hearing. Hayes v. State, 969 S.W.2d 943, 944 (Tenn. Crim. App. 1997). Waiver and previous determination are proper grounds for denial of relief. If there is no factual explanation as to why a claim has not been previously presented, the doctrine of waiver requires dismissal of the claim without an evidentiary hearing. Blair v. State, 969 S.W.2d 423, 425-26 (Tenn. Crim. App. 1997). A petitioner has had a full and fair hearing and is barred by the doctrine of previous determination when he has had the opportunity to present the proof and make argument on a claim. Carter v. State, 958 S.W.2d 620, 625 (Tenn. 1997). In Blair, this court ruled that "[a]lmost any ground for relief, except ineffective assistance of counsel, could be raised during trial, and failure to do so will be deemed a waiver." Blair, 969 S.W.2d at 425.

On direct appeal, this court could not address any issue other than the challenge to the sufficiency of the evidence. Because trial counsel had failed to file a timely motion for new trial, as required by Rule 3(e) of the Tennessee Rules of Appellate Procedure, this court could not address one of the two issues presented on direct appeal:

Whether the trial court erred by ruling that the [petitioner's] prior convictions of felony nonsupport, stalking, and secreting personal property were admissible for impeachment purposes.

Bowling, No. 03C01-9805-CR-00167, slip op. at 2.

In his petition for post-conviction relief, the petitioner asserted that his trial counsel failed to object to "tainted" testimony. The record demonstrates that this court could not address the question of whether the petitioner's prior convictions had been properly admitted. While conceding that the allegations in the petition may have been in reference to other testimony, it is our view, under all of the circumstances, that the petitioner should have been allowed to amend his petition or been permitted appointed counsel. The summary dismissal is, therefore, set aside and the cause remanded to the trial court for further proceedings.

GARY R. WADE, PRESIDING JUDGE